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ARIZONA ATTORNEY GENERAL

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PHOENIX, ARIZONA

February 11, 1970

DEPARTMENT OF LAW LETTER OPINION NO. 70-1-L (R-39)

REQUESTED BY: THE HONORABLE RAY A. GOETZE
State Senator

- QUESTIONS:
1. Is a private corporation which provides sewage disposal service by means of pipe-lines connected to the plumbing systems of the subscribers to the service a public service corporation within the meaning of Article 15, Sections 2 and 10 of the Arizona Constitution?
 2. If the described corporation is a public service corporation within the constitutional definitions, does the Arizona Corporation Commission, under existing law, have the power to issue a certificate of convenience and necessity to it and to regulate its rates and charges and methods of service?

ANSWERS: See body of opinion.

The Constitution of Arizona, Article 15, Section 2, defines public service corporations as follows:

"All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations."

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The term "common carrier", as used in Section 2 above, is defined in Section 10 of Article 15:

"Railways heretofore constructed, or that may hereafter be constructed, in this State, are hereby declared public highways, and all rail-road, car, express, electric, transmission, telegraph, telephone, or pipeline corporations, for the transportation of persons, or of electricity, messages, water, oil, or other property for profit, are declared to be common carriers and subject to control by law." (Emphasis added.)

It is our opinion that sewage disposal corporations utilizing pipelines for transmitting the sewage to their disposal plants, if they are "public service corporations" would be so by virtue of being "pipeline corporations, for the transportation of . . . other property for profit", as those terms are used in Section 10 of Article 15 of the Constitution.

An examination of the foregoing constitutional provisions and of applicable case law leads us to the conclusion that sewage disposal corporations are not "public service corporations", as that term is used in Article 15 of the Arizona Constitution.

Because sewage disposal corporations are not public service corporations, it follows that the Arizona Corporation Commission, under existing law, would not have the power to issue certificates of convenience and necessity to sewage disposal corporations, nor would it have the power to regulate the rates, charges and methods of service of such corporations.

In addition, it is our opinion that only by constitutional amendment could such corporations be declared to be public service corporations, and thereby subject to control of rates and charges and conditions of service, as are existing public service corporations. The Legislature cannot, by mere legislative fiat, make a public service corporation out of a business which is not a "public service corporation" under the Arizona Constitution. See Visco v. State, 95 Ariz. 154, 388 P.2d 155 (1963).

The Arizona Supreme Court in the Visco case, supra, decided that garbage is not "property" within the meaning of that term, as used in Sections 2 and 10 of Article 15 of the Arizona Constitution. In holding that trash carriers are not common carriers, the Court made, among others, the following observations:

" . . . [Article 15, Section 10, Arizona Constitution] would be relevant only if all trucks were held to be common carriers, and the trash here involved were held to be 'other property'. Obviously all trucks are not common carriers. It is the use to which they are put which determines their status. [Citation.] Nor is the trash hauled by appellant 'other property', as that phrase is used in the constitution and in relation to carriers. Its character as 'property' in this case was lost when the owner determined to throw it out. This trash is totally unlike all other property hauled by either common or private carriers. It has been abandoned." 95 Ariz. at 166.

The Court, in Visco, quoted with approval the following language from a New Mexico case:

"Garbage collected to be removed and thrown away insofar as the owner is concerned, is not goods or personal property in the sense used in the definition of 'common carrier'. It must be carried for a consignor to a consignee as goods or something of value." Fairchild v. United Service Corp., 52 N.M. 289, 197 P.2d 875, 883 (1948).

Our Supreme Court observed that the Fairchild decision:

"[R]e-enforces the conclusion that trash is not 'other property' as that phrase is used in the Ariz. Const. Art. 15, Sec. 10." 95 Ariz. at 168.

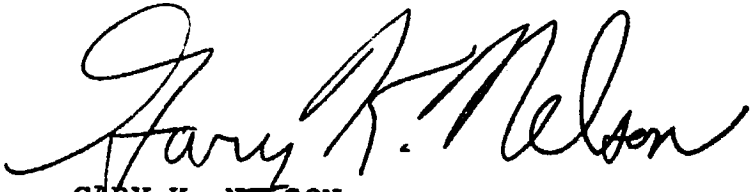
As a result of the Visco case, the Arizona Corporation Commission, after notice and hearing, cancelled all outstanding certificates of convenience and necessity held by carriers

for the transportation of garbage. Three of these cancellations were appealed to the Court of Appeals, which affirmed the decisions of the Corporation Commission. The Supreme Court denied review in each of the cases. Cochise Sanitary Services, Inc. v. Corporation Commission, 2 Ariz.App. 559, 410 P.2d 677 (1966); Arizona Service Co. v. Arizona Corporation Commission, 2 Ariz.App. 563, 410 P.2d 681 (1966); Garbage Service Company v. Arizona Corporation Commission, 2 Ariz.App. 564, 410 P.2d 682 (1966).

We see no justification for classifying sewage any differently than our Supreme Court has classified garbage, in holding that it is not "property", as that term is used in Sections 2 and 10 of the Constitution. Accordingly, we believe the Visco case compels the conclusion that sewage disposal corporations are not "public service corporations" under our Constitution. We have examined cases from other jurisdictions, some of which have held that sewage disposal services are public utilities. However, these cases are not persuasive because of the different definitions of "public utilities" found in constitutions and statutes considered in those decisions.

Additionally, we believe that it could be held that the hauling or transportation of the sewage is merely incidental to the treatment and disposal functions performed by the sewage disposal company. Thus, even if it were held that the sewage disposal company might be carrying "property for hire", within the constitutional definition, such hauling would be a mere incident to its non-carrier functions, making it exempt from classification as a public service corporation. See Arizona Corporation Commission v. Continental Security Guards, 103 Ariz. 410, 443 P.2d 406 (1968).

Respectfully submitted,


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The Attorney General